UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA,	***)***	
	)	
v.	***)***	***Criminal No. 95-47-P-H***
	)	***(Civil No. 98-83-P-H)***
QUINCY D. JOHNSON,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON DEFENDANT'S MOTION FOR COLLATERAL RELIEF UNDER 28 U.S.C. § 2255

Quincy D. Johnson moves this court to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. A sentence of 151 months was imposed after he was found guilty by a jury of possession of five grams or more of cocaine base with intent to distribute and conspiracy to do so, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B) and 846. Judgment (Docket No. 18). Johnson, appearing *pro se*, contends that he was deprived of the effective assistance of counsel at trial, at sentencing, and on appeal.

A section 2255 motion may be dismissed without an evidentiary hearing if the "allegations, accepted as true, would not entitle the petitioner to relief, or if the allegations cannot be accepted as true because 'they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact.'" *Dziurgot v. Luther*, 897 F.2d 1222, 1225 (1st Cir. 1990) (citations omitted). In this instance, I find that each of Johnson's allegations meets one or more of these tests. Accordingly, I recommend that the motion be denied without an evidentiary hearing.

I. Background

Linwood Pullum testified at Johnson's trial pursuant to a plea agreement with the government. Trial Transcript ("Trial Tr.") (Docket No. 23) at 13-14. He testified, *inter alia*, that Johnson first asked him on August 9, 1995 for transportation to Boston so that Johnson could buy cocaine there, *id*. at 17-18; he drove Johnson to Jamaica Plain, Massachusetts on August 9, 1995, where Pullum purchased half an ounce of crack cocaine with money that Johnson had given him, *id*. at 21-22, 87; he sold some of the cocaine after he and Johnson returned to Portland, and he gave Johnson the money from these sales, *id*. at 26-29, 97-106; he and Johnson returned to Boston on August 10 by bus, where Pullum purchased crack cocaine with money that Johnson had given him, and after returning to Portland Pullum again sold some of this crack, again giving the money from the sales to Johnson, *id*. at 29-39, 106-24; on August 15, 1996 he traveled in a borrowed car with Johnson to Boston, where they purchased an ounce of crack cocaine, *id*. at 40-41, 46-49; later that night he and Johnson returned to Maine, and he was driving when he pulled over into the first rest area on the Maine Turnpike, where he and Johnson were arrested, *id*. at 53-54.

Clayton Olyer testified that Pullum asked him to drive Pullum and Johnson to Boston on August 11, 1996 or to let them borrow Olyer's car for that purpose. *Id.* at 159-60. Olyer declined to do so at that time. *Id*. at 160. On August 15, 1996 Olyer drove Johnson and Pullum in his car to two houses. *Id*. at 41-44. Olyer agreed to return later to give Johnson and Pullum a ride to Boston. *Id*. at 41, 44, 169. Olyer then met with agents of the Maine Drug Enforcement Agency and described his conversations with Pullum and Johnson. *Id*. at 169, 185-86, 382. The agents searched Olyer's car, found no crack cocaine, and instructed him to loan the car to Pullum and Johnson. *Id*. at 170-71, 186, 383. Followed and observed by several agents, Olyer met with Pullum and Johnson and

accepted $50 from Pullum for the loan of his car. *Id*. at 171-72, 186, 208-09, 383. Various agents followed the car, which Pullum was driving and in which Johnson was riding, from Portland south on Route 295 and the Maine Turnpike, to the Maine-New Hampshire border. *Id.* at 189-91, 209-10. The agents then set up surveillance at the York toll booths at the entrance to the Maine Turnpike. *Id*. at 190, 210.

The agents saw the car pass through the York toll booths headed north several hours later. *Id*. at 191, 210. They followed the car until it pulled into the first rest stop. *Id.* at 192, 211. Maine state troopers subsequently arrived and order Pullum and Johnson out of the car. *Id*. at 194-95, 212, 235-37. A police dog "alerted" to the presence of narcotics in the car. *Id*. at 248-49. A plastic bag was found on the passenger side floor containing a white, rock-like substance. *Id*. at 250, 256, 260-61. Johnson had been sitting in the passenger seat. *Id*. at 238. Pullum gave the police four "rocks" of crack cocaine that he had in his pocket. *Id*. at 56, 216. The parties stipulated that the substances taken from Pullum and found on the passenger side floor weighed 27.3 grams and contained cocaine base, also known as crack cocaine. *Id*. at 403.

The jury found Johnson guilty of both charges. *Id*. at 514. At sentencing, Johnson's counsel objected to the quantity calculations used to determined the offense level and the lack of an adjustment for Johnson's role in the offense. Transcript of Sentencing Hearing (Docket No. 21) at 5, 10. New counsel represented Johnson on appeal, where his conviction and sentence were affirmed. *United States v. Johnson*, 111 F.3d 122 (1st Cir. 1997) (table).

II. Discussion

Johnson contends that his trial counsel provided constitutionally defective assistance by

failing to perform a pretrial investigation, failing to produce "crucial" witnesses, and not permitting Johnson to testify; that the same lawyer provided ineffective assistance at sentencing because he did not pursue an issue concerning the placing of the stipulation regarding crack cocaine into evidence; and that his appellate counsel provided constitutionally defective assistance by failing to raise the question whether the substance at issue was cocaine base but not crack cocaine. Petition (Docket No. 30) at 5-6.

Strickland v. Washington, 466 U.S. 668 (1984), provides the applicable standard for assessing whether a defendant has received ineffective assistance of counsel such that his Sixth Amendment right to counsel has been violated. First, the defendant must show that his counsel's performance was deficient, i.e., that the attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. at 687. Second, the defendant must make a showing of prejudice, i.e., "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* The court need not consider the two elements in any particular order; failure to establish either element means that the defendant is not entitled to relief. *Id*. at 697. In the First Circuit, courts "will indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance." *Therrien v. Vose*, 782 F.2d 1, 3 (1st Cir. 1986).

A. Failure to Investigate and Call Witnesses

As to his first claim, that trial counsel failed to conduct a pretrial investigation, Johnson offers nothing but the conclusory allegation itself. Affidavit of Quincy D. Johnson ("Johnson Aff.") (Docket No. 31) ¶ 6. He provides specifics only concerning the witnesses he contends that his trial

counsel should have called. In the absence of any specific allegation demonstrating how trial counsel's pretrial investigation itself was constitutionally deficient, any Sixth Amendment claim based on the lack of a pretrial investigation must fail. *David v. United States*, 134 F.3d 470, 478 (1st Cir. 1998) (vague, conclusory or palpably incredible allegations do not entitle section 2255 petitioner to a hearing).

On his second claim, Johnson provides the names of five witnesses whom he contends his trial counsel should have called to testify. Johnson Aff. ¶¶ 7-10. For each such witness, Johnson must show that there is a "reasonable probability" that the jury's conclusion would have been different if it had had that witness's testimony to consider. *Bryant v. Vose*, 785 F.2d 364, 369 (1st Cir. 1986). In addition, "[t]he decision whether to call a particular witness is almost always strategic, requiring a balancing of the benefits and risks of the anticipated testimony." *Lema v. United States*, 987 F.2d 48, 54 (1st Cir. 1993). Here, Johnson cannot overcome the presumption in favor of a strategic decision by his trial counsel for any of the five potential witnesses he identifies.

Johnson first contends that Elizabeth Reading, if called to testify, "would have exposed the government's star witness Mr. Linwood A. Pullum's perjured testimony, and would have exposed Pullum's reasons, motives, unethical tactics, and personal gains for falsely testifying against [him]." Johnson Aff. ¶ 7. Johnson states that Reading was Pullum's girlfriend during the summer of 1995. *Id*. ¶ 8. He offers nothing more about the nature of her possible testimony. Without more, Johnson's allegations concerning Reading as a potential witness are simply too vague to entitle him to a hearing on his Sixth Amendment claim. *United States v. Dawson*, 857 F.2d 923, 928 (3d Cir. 1988). In addition, Johnson's trial counsel cross-examined Pullum extensively and established that Pullum had lied on several occasions to the police and the grand jury. Transcript of Proceedings ("Trial Tr.")

(Docket No. 23) at 63-64, 67, 94-95, 111-12, 136-37.

Johnson next proffers Aishia Frisby as a witness whom his trial counsel should have called to testify. Johnson Aff. ¶ 9. Again, Johnson offers only a conclusory statement concerning her proposed testimony. He says that her testimony "would have shown that I was with her during various days and times between August 9th to August 14th, 1995 considering the government witnesses' false allegations that I were [sic] at a different suspect location." *Id.* In the absence of any specificity concerning times, dates and locations, this submission is also too vague to entitle Johnson to a hearing. It simply does not meet the prejudice prong of the *Strickland* test. In addition, Johnson admits that his trial counsel chose not to present Ms. Frisby's testimony "because she had a criminal record." *Id.* The fact that a potential witness may be easily impeached on cross-examination is itself sufficient reason to uphold counsel's decision not to call such a witness against a Sixth Amendment attack under section 2255. *United States v. McGill*, 11 F.3d 223, 227 (1st Cir. 1993).

The third and fourth potential witnesses offered by Johnson are two employees of AAA Emergency Road Service who worked on his car at his residence on August 9, 1995 from 11:16 a.m. to 3:43 p.m. who, according to Johnson, would have testified that he did not leave his residence during that time. Johnson Aff. ¶ 10. While this allegation is sufficiently specific, it does not help Johnson. Pullum's testimony concerning August 9, 1995 was that he picked Johnson up between 4:00 and 5:00 p.m. and that they thereafter drove to Roxbury, Massachusetts, where Pullum purchased crack with Johnson's money. Trial Tr. at 19-22, 82. Other witnesses placed Johnson at the Big Apple store earlier that day, but not specifically within the hours to which he avers the AAA employees could testify. The proffered evidence, therefore, would not have contradicted the

evidence of Johnson's guilt, *Shraiar v. United States*, 736 F.2d 817, 818 (1st Cir. 1984), and there can be no reasonable probability that the jury's verdict would have differed because of it.

The same is true of the final witness mentioned by Johnson, his mother. He makes the same representation concerning her potential testimony that he makes for the AAA employees, Johnson Aff. ¶ 10, and there is no reason to treat her differently. Johnson has failed to meet the requirements of *Strickland* concerning the failure to call any of the witnesses he identifies.

B. Refusal to Allow Defendant to Testify

Johnson next contends that his trial counsel refused to allow him to testify. If Johnson, on advice of counsel, knowingly and voluntarily refrained from testifying, however reluctantly, there is no Sixth Amendment violation. *Lema*, 987 F.2d at 52. If there is no attempt by counsel to coerce the testimonial decision, nor any evidence that the defendant's will was overborne by counsel, legal advice concerning exercise of the right to testify infringes no right. *Id*. at 52-53. Johnson's affidavit provides the following information concerning this claim, in its entirety:

> I apprised [trial counsel] of my desire to testify on my own defense. [Trial counsel] insisted that it wont [sic] be good idea to take the witness stand. Instead, [trial counsel] advised me that he would elicit enough information from my defense witnesses that it won't be necessary for me to take the witness stand.
>
> Thereafter, [trial counsel] intentionally failed to interview and/or call to the witness stand any of the requested defense witnesses, and at the same time he did not permit me to take the witness stand in my own defense.

Johnson Aff. ¶¶ 11-12. The affidavit continues with the substance of the testimony that Johnson would have given, including a protestation of innocence. *Id*. ¶ 12.

To the extent that the affidavit may be interpreted to suggest that Johnson's will concerning

his right to testify was overborne by his trial counsel, or that he was coerced, it is belied by the record. After both the government and the defense had rested, and outside the presence of the jury, the court conducted the following colloquy with Johnson:

> THE COURT: Mr. Johnson, have you had the opportunity to talk with [trial counsel] about whether or not you should take the stand?
>
> MR. JOHNSON: Yes, I have, Your Honor.
>
> THE COURT: Do you understand you have the right to testify if you choose to, but you also have the right not to testify. And if you choose not to testify, I will tell the jury they can draw no inference or suggestion of guilt from the fact that you did not testify. Do you understand those choices?
>
> MR. JOHNSON: Yes, I do, Your Honor.
>
> THE COURT: Have you consulted with your lawyer about that?
>
> MR. JOHNSON: Yes, Your Honor, I have.
>
> THE COURT: Are you satisfied with his advice?
>
> MR. JOHNSON: Yes, I am.
>
> THE COURT: Do I understand that you have decided not to take the stand?
>
> MR. JOHNSON: Yes, you do.

Trial Tr. (Docket No. 24) at 451-53. This admitted agreement with his counsel's advice is sufficient support for a finding that Johnson's will was not overborne and that he was not coerced. *Lema*, 987 F.2d at 53.

C. The Stipulation

Under the heading "counsel provided ineffective assistance at sentencing process," Johnson's

petition alleges that "counsel was ineffective because although he complained to the court that the stipulation to crack should not be placed in evidence he did not pursue this issue." Petition at 5. His affidavit amplifies this allegation as follows: (i) trial counsel "should not have stipulated under any circumstances without consulting with me that the substance involved in my case was a type of cocaine base which is also known as crack cocaine," Johnson Aff. ¶ 14; (ii) Johnson had asked trial counsel to argue that the substance involved in his case was not crack because Pullum's testimony demonstrated that the substance involved was below average purity and the Maine Drug Enforcement Agency chemical field test submitted into evidence does not refer to crack, but only establishes that the substance involved was cocaine base, *id.* ¶¶ 17, 19; and (iii) when trial counsel objected at trial to admission of the written stipulation into evidence after it was read by the prosecutor, he did not pursue the cocaine base/crack issue at sidebar, *id.* ¶ 16.

Ordinarily, the decision to enter into a stipulation is considered a tactical one, which will not support a claim of constitutionally deficient assistance of counsel. *E.g., United States v. Kennedy*, 797 F.2d 540, 543 (7th Cir. 1986). "[W]here a defense attorney makes a tactical decision with constitutional implications, a stipulation does not require the defendant's consent." *Poole v. United States*, 832 F.2d 561, 564 (11th Cir. 1987) (internal quotation marks and citation omitted) (stipulation to essential element of crime charged). Here, the question whether the substance involved was crack cocaine as well as cocaine base was not an element of the crime charged. Indictment (Docket No. 7). The question is relevant only in the context of sentencing, when the penalty for conspiracy involving crack cocaine is more severe than for conspiracy involving other forms of cocaine. United States Sentencing Commission Guidelines § 2D1.1(c).

The stipulation at issue here provided:

> The white rocklike substance that Officer Barry Bartlett seized on August 16, 1995, from the floor of the Ford Escort in which Quincy D. Johnson had been a passenger, and the white rock substance seized on August 16th, 1995, from Linwood Pullum's shorts weighs 27.3 grams and contains cocaine base, which is also known as crack cocaine, and is a controlled substance.

Trial Tr. at 403. Trial counsel's decision to enter into this stipulation was a reasonable one. Contrary to the defendant's argument, the fact that the chemical analysis reported only that the substance was cocaine base, not crack, Maine Drug Enforcement Agency Chemical Field Test Report, Exh. A to Government's Response to Motion to Vacate, Set Aside or Correct Sentence Filed Pursuant to Title 28, U.S.C., Section 2255 (Docket No. 35), does not require a conclusion that the substance was not crack or that the government could not have proved that it was crack. As the First Circuit has recently noted, "[c]hemical analysis cannot distinguish crack from any other form of cocaine base because crack and all other forms of cocaine base are identical at the molecular level." *United States v. Robinson*, ___ F.3d ___, 1998 WL 219789 (1st Cir. Apr. 9, 1998), at *5. "Crack can be differentiated from other cocaine bases only by appearance and texture, and the applicable guideline, which refers to crack as 'the street name' for a particular form of cocaine base, USSG § 2D1.1(c)(n.(D)), strongly suggests that knowledge of what dealers and users consider to be crack may be a satisfactory experiential base for opinion evidence." *Id.* (upholding testimony of DEA agent that substance was crack).

Here, Pullum, who stated that he was a cocaine user, testified repeatedly that the substance found in the vehicle and on his person was crack. *E.g.*, Trial Tr. at 17, 48-49, 52, 60. Experienced officers of the Maine Drug Enforcement Agency and the City of Portland Police Department testified that the substance appeared to be crack cocaine. *Id*. at 207, 216; 241, 250, 257. Nothing further was

necessary, even in the absence of the stipulation, to establish that the substance was crack cocaine.[1]

Accordingly, neither entering into the stipulation, failing to argue that the substance was not crack, nor failing to raise the issue in a sidebar conference concerning only the admissibility of a written stipulation into evidence could constitute constitutionally deficient assistance of counsel. *See generally United States v. Washington*, 115 F.3d 1008, 1010-11 (D.C. Cir. 1997) (failure to object to presentence report on ground that substance defendant was dealing was not crack, coupled with plea of guilty to distribution of "five grams or more of cocaine base or crack" sufficient to support sentencing on basis of crack cocaine). Johnson did not object to the presentence report in this case on the ground that the substance at issue was not in fact crack cocaine. Transcript of Proceedings, Presentence Conference (Docket No. 20); Transcript of Proceedings, Sentencing Hearing (Docket No. 21) at 2-4.

Johnson relies on two cases to support his argument that the substance involved here was not proved to be cocaine. One, *United States v. Culpepper*, 916 F. Supp. 1257 (N. D.Ga. 1995), was subsequently vacated, 116 F.3d 1493 (11th Cir. 1997), and the other, *United States v. Monroe*, 978 F.2d 433 (8th Cir. 1992), is inapposite because the trial court in that case relied on an improper standard of proof in making its sentencing determination and the expert testimony was to the effect that the substance at issue was "procaine *or* cocaine base with some procaine mixed in," *id*. at 435 (emphasis in original). Significantly, the Eighth Circuit in *Monroe* did not order that sentencing not be based on crack cocaine, but only ordered rehearing. *Id.* In any event, no such confusion is present

[1] Johnson cites to no authority, and my research has located none, to support his contention that cocaine base of "below average purity," Johnson Aff. ¶ 17, cannot be crack cocaine.

in the record in this case.

C. Appellate Counsel

Johnson's final contention[2] is that his counsel on appeal failed to provide effective assistance because "he failed to unearth the various instances of trial/sentencing counsel's ineffectiveness especially the cocaine-versus-crack claim." Johnson Aff. ¶ 20. None of the instances of alleged ineffectiveness of trial counsel specified by Johnson would provide valid grounds for appeal. In the First Circuit, claims of ineffective assistance of counsel are not ordinarily considered on direct appeal. *Untied States v. Ortiz*, ___ F.3d ___, 1998 WL 299392 (1st Cir. Jun. 12, 1998), at *2. In addition, as discussed above, the claims fail to satisfy the *Strickland* standards on their merits. In particular, the argument upon which Johnson places the most weight, that the substance at issue was not crack cocaine, is refuted by the record, as discussed above. Further, Johnson could not have unilaterally withdrawn on appeal his stipulation made at trial on this point, "[a]bsent extraordinary circumstances," *United States v. Ruiz-Garcia*, 886 F.2d 474, 476 (1st Cir. 1989), which Johnson does not allege.

A defendant's lawyer is not required to appeal on grounds that have no merit in order to provide constitutionally sufficient assistance. Johnson's claim concerning his appellate counsel meets neither prong of the *Strickland* test.

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[2] Johnson's "Traverse," Docket No. 37, raises at least two additional claims, one concerning an alleged due process violation and one concerning the closing argument of the prosecutor. Neither claim was raised in Johnson's petition or his supporting affidavit, and therefore neither may be considered by this court. *Isabel v. United States*, 980 F.2d 60, 61 n.1 (1st Cir. 1992).

III. Conclusion

For the foregoing reasons, I recommend that the defendant's motion to vacate, set aside or correct his sentence be **DENIED** without a hearing.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 24th day of June, 1998.

_____

David M. Cohen
United States Magistrate Judge